

Via E-Mail

September 4, 2012

Corbin R. Davis
Clerk
Michigan Supreme Court
Michigan Hall of Justice
925 Ottawa Street
Lansing, MI 48913

***Re: Proposed Amendments of Michigan Court Rules
ADM File No. 2006-47
Comments of Detroit Free Press***

Dear Mr. Davis:

Attached are the comments on behalf of my client, Detroit Free Press, Inc., to the above-referenced proposed amendments of Michigan Court Rules. Please note that the Free Press and The Detroit News have collaborated on a joint submission. The Court will be receiving the same comments from James E. Stewart, counsel for The News.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP



Herschel P. Fink

Attorney for Detroit Free Press, Inc.

Attachment

cc: James E. Stewart, Esq.

Memorandum

To: Corbin Davis, Clerk
Michigan Supreme Court

From: Herschel P. Fink, Counsel for Detroit Free Press
James Stewart, Counsel for The Detroit News

Re: Proposed Amendments of Court Rules

Date: August 31, 2012

Dear Mr. Davis:

We are submitting these joint comments on behalf of our respective clients Detroit Free Press and The Detroit News. While the proposed rules are a positive step in updating rules to meet the increasing use of electronic filing and the electronic storage of court files, we wish to address several provisions that could limit the public's constitutional and common law right of access to public court records.

Proposed Rule 1.109: This proposed rule defines discovery materials filed with the court as "public records." Proposed subsection (2), however, exempts from that definition any discovery material not previously filed with the court, even though that material is introduced into evidence during a public court proceeding. Obviously, a court is sensitive to ensuring that exhibits are not tampered with during the course of a public proceeding. However, refusing to consider these exhibits to be public records or to allow access to them, under controlled conditions, has prompted access litigation in the past. This has most often occurred where a news organization, as a representative of the public, has observed the use of the exhibits during the public proceeding and in order to report more accurately requests a copy from the clerk. If told that they cannot do so, tensions mount, and the public interest in having an informed public is not served. Moreover, most trial courts do permit news organizations to examine and copy admitted trial exhibits, whether at the end of the day, or during breaks. This fosters better public understanding of court proceedings. We would suggest that subsection (2) instead state that exhibits entered into evidence during a public proceeding are public records during the pendency of the proceeding until returned

to the parties per MCR 2.518 or MCR 3.930, and that copies of those exhibits will be made available upon request, subject to the court's need to control the proceeding.

Proposed Rule 8.119: Portions of this proposed rule seem unnecessarily complicated and contradictory. For example Section D(1)(d) includes the Case File ("the pleadings, process, written opinions, findings, orders and judgments filed in the action") as part of what is described as the "case record." However, Section H provides that the "public information in the Register of Actions" (now known as the docket") may be available through a publicly accessible website. Given the definition of Register of Actions, it is difficult to understand why Section H would limit public access only to the "public information" in the Register of Actions. Presumably all information in the Register of Actions is public except for the very rare situation when a file including the docket (Register of Actions) has been sealed by the trial court in accordance with this court's standard defined at MCR 8.119(F).

Additionally, proposed Rule H goes on to provide that "all other public information in its case records may be provided through electronic means only upon request." If we understand this correctly, this means that a court may make the "public information" (a term which does not seem to be defined) of the Register of Actions available on a publicly available site, but has no obligation to make any other public record, including the "case file," publicly available unless there is a request. Such an approach does not seem to allow for the rapid improvements in technology that permit a court to have what are now known as the docket and the pleadings available on a publicly available web site. For example, the United States District Court for the Eastern District of Michigan provides a public RSS feed on its web site of all filings and the documents filed. Ultimately such an approach saves time for those seeking the pleadings in a case and will save the courts the time of responding to requests for more than simply the Register of Actions.

Proposed Subsection J to 8.119 provides that a court "may not charge an access or reproduction fee for a case record that the court is required by law or court rule to provide without charge to a person or other entity..." We believe that the meaning of exactly what case records are intended to be covered by this subsection should be more specifically defined. Certainly we would urge that it should be very clear that a court may not impose any pay wall or similar hurdle to the public obtaining any case record that is available on a publicly available web

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site. Further, we have concerns that the cost model may be subject to some abuse. The reference to “actual cost of labor and supplies and the actual use of the system” leave much open to interpretation. Whose labor is included, and how would actual use be measured? It seems to us that the rule could more closely track relevant FOIA language to avoid potential issues.

Thank you for the opportunity to provide these comments.

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